No. 89-1928 (3)

FILED
AUG 31
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SAN ANTONIO SAVINGS ASSOCIATION AND SUBSIDIARIES
(RESOLUTION TRUST CORPORATION, RECEIVER),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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Counter-Question Presented

1. Whether Section 165 of the Internal Revenue Code precludes the deductibility of losses realized under Section 1001 of the Code upon an exchange of mortgage loans between unrelated financial institutions.

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STATUTES AND REGULATIONS INVOLVED

Sections 108, 165, and 1001 of the Internal Revenue Code of 1954 (26 U.S.C. (1982)) and Sections 1.165-1(b) and 1.1001-1(a) of the Treasury Regulations on Income Tax (26 C.F.R.).

REASONS FOR DENYING THE WRIT

Respondent[1] agrees with Petitioner that this case presents the same question regarding the tax treatment of mortgage loan exchanges under Federal Home Loan Bank Board Memorandum R-49 that is presented in *United States v. Centennial Savings Bank, FSB (Resolution Trust Corporation, Receiver)*, No. 89-1926, and *United States v. First Federal Savings & Loan Association of Temple*, No. 89-1927. However, for the reasons stated in Respondent's brief in opposition to the petition for a writ of certiorari in *Centennial*, No. 89-1926, the only question on which there is a conflict in the circuits, and the question properly presented by these cases, is whether Section 165 of the Internal Revenue Code precludes the deductibility of tax losses realized under Section 1001 of the Code upon an exchange of mortgage loans between unrelated financial institutions. On this narrow question, Respondent believes that review by this Court is not warranted.

Respondent agrees with Petitioner that this case should not be treated as the lead case in this Court

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[1] While this case was pending on appeal in the circuit court below, San Antonio Savings Association was found insolvent by the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed receiver. Subsequently, pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, the Resolution Trust Corporation took over as receiver. Accordingly, the Resolution Trust Corporation as receiver for San Antonio Savings Association is the Respondent in this action.

Pursuant to Supreme Court Rule 29.1, Respondent states that San Antonio Savings Association has no parent company and that its only subsidiaries are wholly owned.

and that this Court should not grant plenary review here. Respondent believes, and has so advised Petitioner, that the receiver does not have and never will have sufficient assets to allow collection of any part of the tax deficiency at issue here in the event the Commissioner ultimately were to prevail.

However, Respondent has no objection to Petitioner's request that the Court hold this petition pending the outcome of the petitions for a writ of certiorari filed in *Centennial* and *First Federal.*

CONCLUSION

Respondent respectfully requests that the question presented in this case be considered as restated herein, and has no objection to disposing of this case as appropriate in light of this Court's disposition of *United States v. Centennial Savings Bank, FSB (Resolution Trust Corporation, Receiver)*, No. 89-1926, and *United States v. First Federal Savings & Loan Association of Temple*, No. 89-1927.[2]

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[2] The Acting Solicitor General has authorized the filing of this response.

Respectfully submitted,

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